Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1087.

LEEWARD PETROLEUM, LTD., a Bermuda Corporation,
Petitioner,

v.

MENE GRANDE OIL COMPANY, a Delaware Corporation, and GULF OIL CORPORATION, a Pennsylvania Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

E. NORMAN VEASEY,
ALLEN M. TERRELL, JR.,
DAVID B. STRATTON,
RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
P. O. Box 551,
Wilmington, DE 19899

Attorneys for Respondents Mene Grande Oil Company and Gulf Oil Corporation.

Of Counsel:
KEVIN F. CUNNINGHAM,
The Law Department,
The Gulf Companies,
P. O. Box 3725,
Houston, Texas. 77001

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International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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OPINION BELOW

The United States Court of Appeals for the Third Circuit (the "Court of Appeals") entered an order without opinion dismissing the interlocutory appeal attempted by Petitioner, Leeward Petroleum Ltd., a Bermuda corporation (sometimes referred to as "Leeward" or "Petitioner"), plaintiff in the United States District Court for

the District of Delaware (the "District Court"). Mene Grande Oil Company, a Delaware corporation ("Meneg") and Gulf Oil Corporation, a Pennsylvania corporation ("Gulf"), defendants in the District Court, moved to dismiss the appeal in the Court of Appeals.

The Court of Appeals dismissed the appeal for lack of jurisdiction over Petitioner's appeal of the interlocutory order of the District Court. The interlocutory order, entered in the exercise of the District Court's dicretion, temporarily stayed the action in the District Court pending final determination of a declaratory judgment action in the courts of the Republic of Venezuela (the "Venezuelan action"). The interlocutory order also denied without prejudice Leeward's motion to enjoin Meneg from proceeding in the Venezuelan action, which motion was filed nearly a year after commencement of the Venezuelan action and after Meneg and Gulf moved to dismiss or stay the District Court action.[1]

JURISDICTION

Jurisdiction of this Court is purportedly invoked under 28 U. S. C. § 1254(1). Since the petition merely attacks the dismissal of an appeal of an interlocutory order, there is actually no case in the Court of Appeals to which certiorari can be granted.

STATUTE INVOLVED

The Petition claims that this Court should review the dismissal of an interlocutory appeal because the Court of Appeals was powerless to so dismiss and was required to accept jurisdiction by reason of 28 U. S. C. § 1292(a)(1). Respondents deny that the statute grants jurisdiction to review the District Court's interlocutory order.

1. Appendix G and C, respectively, to the Petition for a Writ of Certiorari, hereinafter cited as "PB" followed by page references.

QUESTION PRESENTED

Whether or not this Court should grant certiorari to the Court of Appeals to review its order dismissing for lack of jurisdiction an appeal of an interlocutory order of the District Court staying temporarily proceedings in that court pending determination of a declaratory judgment action in the courts of the Republic of Venezuela and, thereby, denying Petitioner's ancillary and subsequently filed motion to enjoin proceedings in the Venezuelan action.

COUNTERSTATEMENT OF THE CASE

This is a civil action for alleged breach of contract and related claims which action arises out of negotiations in Venezuela for the sale of Venezuelan crude oil by Meneg to Leeward. (2a).[2] Meneg and Gulf deny Leeward's claims, including the existence of any contract, and submit, among other defenses, that the approval of the sale by the Venezuelan Ministry of Mines and Hydrocarbons was required and refused. (14a, 26a).

Defendants have contended throughout the litigation that only the Venezuelan courts should decide the matter since important issues of Venezuelan Hydrocarbon law lie at the root of the entire controversy. (19a). These issues are matters of *Orden Publico* (i.e. matters affecting the vital national interests of Venezuela) and should be decided only by the Venezuelan Courts. Accordingly, Meneg instituted a declaratory judgment action in Venezuela requesting a ruling on the following threshold question of

2. References to the appendix which was filed by Leeward in the Court of Appeals, and which is part of the record in that court, will be designated in parenthesis with a page number followed by the letter "a", e.g. "(2a)." References to the record in the District Court, which has been returned to that court with the Court of Appeals' mandate, will be designated as "Docket No. ___."

Venezuelan law: Did the transaction require Venezuelan government approval and, if so, did the refusal of that approval vitiate any alleged contract? Meneg and Gulf then sought a stay in the District Court pending that determination. (28a).

Leeward did not immediately move in the District Court to enjoin Meneg from proceeding in Venezuela, electing instead to litigate in the Venezuelan forum by filing a series of dilatory motions including a *lis pendens* motion in which Leeward asked the Venezuelan Court to dismiss that action because of the prior pendency of the action in the District Court. (61a, 70a, 80a). Nearly a year after the Venezuelan action was commenced and the motion to stay was filed in the District Court, Leeward filed a motion to enjoin Meneg from proceeding in Venezuela. (31a, 67a).

The Venezuelan Court, in a scholarly and comprehensive opinion, denied Leeward's *lis pendens* motion, holding that the threshold questions of Venezuelan Hydrocarbons law governing this controversy were matters of *Orden Publico* and are matters which are vital and sensitive to the interests of the Republic of Venezuela. The Venezuelan Court expressly held that *only* the Venezuelan courts should decide them. (74a-88a).

After thorough briefing by the parties and after argument on May 11, 1979, the District Court exercised its discretion by provisionally granting the motion to stay pending the outcome of the Venezuelan proceeding. (89a *et seq.*). This ruling was followed by an office conference on May 15, 1979, at which the Court was asked by Leeward to rule on its later filed ancillary motion to enjoin and to certify the stay order to the Court of Appeals. On that date the interlocutory order was entered and the trial judge denied Leeward's motion to certify. (163a-167a).

Leeward's Petition is misleading in describing these events. The procedural context of the motions before the District Court was thoroughly briefed in the Court of Appeals [3] and apparently demonstrated to the satisfaction of that Court the bases for Respondents' motion to dismiss the appeal. The Court of Appeals could determine from the entire context of the proceedings in the District Court, including the 73 page transcript of the May 11, 1979 hearing, the nature of the interlocutory order and the factors considered by the District Court. These factors are set forth in detail [4] in the record before the Court of Appeals. This record demonstrates, therefore, that the central issue in the District Court was a discretionary stay and Leeward's motion to enjoin was an afterthought to attempt to bootstrap an appeal. The Court of Appeals properly found it had no jurisdiction and dismissed the appeal.

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3. Brief For Defendants-Appellees Mene Grande Oil Company and Gulf Oil Corporation (Docket No. 4) in the Court of Appeals ("Respondents' Brief below").

4. Respondents' Brief below (at 17-19) contained a detailed summary of the discretionary factors involved in the District Court's decision. These need not be repeated here except to note that the District Court did not regard the Venezuelan action as duplicative; rather, that action was in aid of the District Court on fundamental matters of Venezuelan law which were best determined by the Venezuelan Court initially before proceeding further in the District Court. Since these issues were matters of *Orden Publico*, they were not mere matters of Venezuelan law which could be proved in the District Court. The Venezuelan Court had already ruled on the question and held that *only* the Venezuelan Courts should decide the threshold issues. When it is appropriate to lift the stay in the District Court the final decision of the Venezuelan Court would have an important bearing on the outcome. *Id.*

ARGUMENT

The Court of Appeals Has Not Decided an Important Question of Federal Law Which Should Be Settled by This Court and the Decision Is Not in Conflict With the Decision of Another Court of Appeals in the Same Matter

The decision below did not decide an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 19(1)(b). For Leeward to suggest otherwise is ludicrous. Respondents submit that the result below is consistent with this Court's interpretation of 28 U. S. C. § 1292(a)(1).

The statutory grant of jurisdiction over interlocutory injunction orders was intended to prevent a party's incurring a serious and perhaps irreparable injury if it were required to await the final disposition of the case before taking an appeal from the District Court's order concerning injunctive relief. *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176, 181 (1955); 26 Stat. 826 § 7 (1891) as amended 28 Stat. 666; 31 Stat. 660 (1900); Judicial Code of 1911, 36 Stat. 1087, 1137 as amended 43 Stat. 937 (1925); 28 U. S. C. (1940 Ed.) §§ 225(b), 227, 227A. This case does not involve any substantive injury to Leeward and lack of jurisdiction over its appeal will result in no irreparable injury. While Leeward futilely argues its alleged injury, the argument is demonstrably hollow when examined in light of the purpose of the statute.

Leeward suggests that merely because it moved to enjoin proceedings in Venezuela—one year after Respondents had filed in Venezuela and moved for a stay in the District Court—the Court of Appeals must accept jurisdiction over its interlocutory appeal. Leeward's motion was not related to the merits of its action. Leeward relates how its motion

to enjoin was denied (PB, 10), how denial of its motion to enjoin means it must await the outcome of the Declaratory Judgment Action in Venezuela (PB, 14), and how courts treat motions to stay in one forum and to enjoin in another forum as a single venue question (PB, 15). Even if Petitioner's points were valid—which respondents of course deny—the factors appropriate for granting certiorari under Supreme Court Rule 19 simply are not present in the case at bar.

Petitioner acknowledges that § 1292(a)(1) is a limited exception to the "ordinary rule" that interlocutory orders are not appealable (PB, 8-9). It cites the decisions of this Court narrowly construing § 1292(a)(1). *Cf., Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1972) (PB, 8) (dicta in decision holding interlocutory class action order appealable as final, collateral order); *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176 (1955) (PB, 8, 12) (a trial court's refusal to stay equitable proceedings pending arbitration is not appealable); *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U. S. 23 (1966) (PB, 11) (denial of a motion for summary judgment because of the presence of unresolved issues of fact is not appealable); *Gardner v. Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978) (PB, 12) (an interlocutory order denying class certification in an action for injunctive relief is not appealable under § 1292(a)(1)); *Morgantown v. Royal Insurance Co.*, 337 U. S. 254 (1949) (PB, 12) (a denial of a demand for a jury trial is not appealable; also distinguishing two earlier cases cited by Petitioner: *Enelow v. New York Life Insurance Co.*, 293 U. S. 379 (1935) and *Ettelson v. Metropolitan Life Insurance Co.*, 317 U. S. 188 (1942) (PB, 13)); and *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949) (PB, 14) (dicta in decision finding refusal to require plaintiff to provide bond as prerequisite to maintaining derivative suit to be an appealable

collateral order; but see the Court's subsequent rejection of the "death knell" doctrine as a test of whether or not an interlocutory order is appealable as a final order in *Coopers & Lybrand v. Livesay*, 437 U. S. 463 (1978) (PB, 14)).

Respondents submit that the decision below is consistent with this Court's well-settled interpretation of § 1292 (a)(1). Petitioner apparently concedes the clarity of this Court's interpretation of the statute, but suggests something unique in the trial court's treatment of the motions.

Petitioner's theory here seems to be that if a trial judge presumed his interlocutory decision to be appealable, it is necessarily appealable (PB, 9-11). First, we do not read the record as suggesting that the trial judge felt that his interlocutory order was necessarily appealable. Even if he did, so what? It is for the Court of Appeals to determine whether the trial court's interlocutory order is appealable. The trial judge's role is limited to determining whether to grant a motion to certify his opinion. Here the District Court's denial of Petitioner's motion to certify cannot be bootstrapped into the basis for petitioner's claim that the Court of Appeals had to take jurisdiction of its interlocutory appeal (PB, 11).

Second, the trial judge's deliberations evidence the discretionary nature of his ruling, in which denial of the Petitioner's motion to enjoin was only ancillary to the judge's basic decision to stay temporarily proceedings in the District Court:

> "The Court: Very well. Now, the question of the stay was litigated, and, of course, I did not make any formal ruling when we had our hearing . . . Friday, May the 11th about the motion for the injunctive relief. *I thought that the very fact that I stayed this action here indicated that the matter down there should proceed.* But to make it formal I now formally rule that the injunction which is requested by the Plaintiff in this case is denied." (PB, 29). (Emphasis added).

The rulings in the District Court of which petitioner sought review by the Court of Appeals are discretionary. This Court has restrained itself from reviewing such discretionary rulings. *Landis v. North American Co.*, 299 U. S. 248 (1936) (PB, 13); and *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952) (PB, 12): [5]

> "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." *Id.*, at 183-184.

An order which merely continues the case and does not reach the merits of the substantive claim is nothing more than a step in processing the action. The grant of a motion to stay and, as a corollary, the denial of a later filed motion to enjoin proceedings in the other forum, does not constitute a denial of an injunction for purposes of appeal under 28 U. S. C. § 1292(a)(1). *Rodgers v. United States Steel Corp.*, 541 F. 2d 365, 373 (3d Cir. 1976) (PB, 12); *Cotler v. Inter-County Orthopaedic As-*

5. Petitioner apparently misreads *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, as involving an issue under § 1292(a). Rather, this Court granted certiorari because the issues involved important questions as to the conduct of multiple litigation in the federal judicial system. *Id.*, 183. By contrast, the case at bar does not involve multiple federal court litigation.

sociation, P. A., 526 F. 2d 537, 540 (3d Cir. 1975) (PB, 12); and *Stateside Machinery Co. v. Alperin*, 526 F. 2d 480, 42 (3d Cir. 1975) (PB, 12). The order of the Court of Appeals is consistent with these cases in the Third Circuit.

Furthermore, there is no conflict between the decision below and those of another court of appeals on the same matter. The Petitioner points to no other decision involving a set of circumstances similar to that passed upon by the District Court in ruling upon Respondents' motion to stay proceedings before it pending the outcome of a Venezuelan declaratory judgment action to determine certain "threshold" issues on the Venezuelan contract claims.

Petitioner's citations to decisions in other courts of appeals do not demonstrate a conflict among the courts of appeals. The cases fall within two consistent categories: (a) nonappealable interlocutory orders involving motions to stay; *see, e.g., Ephraim Freightways, Inc. v. Red Ball Motor Freight, Inc.*, 376 F. 2d 40 (10th Cir. 1967), *cert. denied*, 389 U. S. 829 (1967) (PB, 12) and *Wallace v. Norman Industries, Inc.*, 467 F.2d 824 (5th Cir. 1972) (PB, 12); and (b) cases where the interlocutory order directly or indirectly affected the merits of the case; *Canadian Filters (Harwich) v. Lear-Siegler, Inc.*, 412 F. 2d 577 (1st Cir. 1969) (PB, 12), *Carter v. American Telephone & Telegraph Co.*, 365 F. 2d 486 (5th Cir. 1966), *cert. denied*, 385 U. S. 1008 (1967) (PB, 16); *Codex Corporation v. Milgo Electronic Corp.*, 553 F. 2d 735 (1st Cir. 1977), *cert. denied*, 434 U. S. 860 (1977) (PB, 12); *Mercury Motor Express, Inc. v. Brinke*, 475 F. 2d 1086 (5th Cir. 1973) (PB, 15) and *Warshawsky & Co. v. Arcata National Corp.*, 552 F. 2d 1257 (7th Cir. 1977) (PB, 12). By contrast, Petitioner's motion to enjoin does not involve its claims for relief or the merits of its complaint.

The interlocutory decision of the District Court is one of numerous procedural rulings that are routinely made by trial courts. Congressional policy prohibits interlocutory appeals of these decisions. The interlocutory order of the District Court, over which the Court of Appeals declined to exercise jurisdiction, can be compared to a trial court's order denying class certification, which this Court has held to be nonappealable: [6]

> "The order denying class certification in this case did not have any such 'irreparable' effect. It could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claims; and it did not pass on the legal sufficiency of any claims for injunctive relief." *Gardner v. Westinghouse Broadcasting Company, supra*, 437 U. S. at 480-481.

The order below by the Court of Appeals is consistent with the Congressional policy against piecemeal appeals. This Court so stated forcefully in *Switzerland Cheese Association v. Horne's Market*, 385 U. S. 23 (1966):

> "Unlike some state procedures, federal law expresses the policy against piecemeal appeals. . . . Hence, we approach this statute [28 U. S. C. § 1292 (a)(1)] somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders. . . . Orders that no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)." *Id.*, 385 U. S. at 24-25.

6. As with the question of class certification, the fact that the District Court denied the motion to enjoin without prejudice to renewal in the future if circumstances should warrant shows that there are no irreparable consequences flowing from that order. *See, Gardner v. Westinghouse Broadcasting Co., supra* at 480.

CONCLUSION

The issues raised by the petition are not special and important matters for certiorari. The decision is consistent with this Court's interpretation of federal law and congressional policy. The decision does not conflict with decisions of other courts of appeals. The decision correctly dismissed for lack of jurisdiction an interlocutory appeal from the trial court's ruling which did not affect the merits of the controversy. The petition for certiorari should be denied.

Respectfully submitted,

E. NORMAN VEASEY,
ALLEN M. TERRELL, JR.,
DAVID B. STRATTON,
RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
P. O. Box 551,
Wilmington, DE 19899
Attorneys for Respondents
Mene Grande Oil Company and
Gulf Oil Corporation.

Of Counsel:

KEVIN F. CUNNINGHAM,
The Law Department,
The Gulf Companies,
P. O. Box 3725,
Houston, Texas 77001

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